DR JAMES ALFRED (SABAH)

v.

KOPERASI SERBAGUNA SANYA BHD (SABAH) & ANOR

FEDERAL COURT, KUALA LUMPUR
MOHAMED DZAIDDIN CJ
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
[CIVIL APPEAL NO: 04-2-2000(W)]
27 JUNE 2001

LABOUR LAW: *Industrial court - Award - Backwages - Principles in assessing - Remuneration received from other employment after dismissal - Whether must be deducted from or set off against backwages to be awarded*

The appellant was dismissed from the employ of the respondent company on 1 June 1986. The Industrial Court found for the appellant and awarded him arrears of salary (backwages) from 1 June 1986 to 11 October 1995 (last day of hearing), compensation *in lieu* of reinstatement of one month's salary for each year of service from 1 November 1984 (date joined) to 11 October 1995, and 20 days' wages *in lieu* of unutilised leave. The High Court refused the respondent's application for *certiorari* but the Court of Appeal allowed the respondent's appeal in part in respect of backwages. In quashing the award on backwages and remitting the matter to the Industrial Court for reassessment, the Court of Appeal held that in assessing the award for backwages the Industrial Court should have taken into account the fact that the appellant had found employment elsewhere after his dismissal. The appellant appealed to the Federal Court.

Held:
Per Steve Shim CJ (Sabah & Sarawak)

[1] Although the assessment of backwages is a matter well within the discretion of the Industrial Court, that discretion is not one which is unfettered; it has to be exercised according to law and to equity as conceived by s. 30(5) of the Industrial Relations Act 1967. The discretion is in the nature of a decision-making process and is therefore open to judicial review. In line with equity and good conscience the Industrial Court should, in assessing the quantum of backwages, take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. A failure to do so amounts to a jurisdictional error of law and *certiorari* will lie to correct it. In the present case, the Industrial Court had failed to take into account

the material fact that the appellant had been gainfully employed soon after his dismissal. The award in respect of backwages was therefore flawed.

[Appeal dismissed; order of Court of Appeal quashing backwages and remitting matter to Industrial Court for reassessment affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah dipecat daripada bekerja dengan syarikat responden pada 1 Jun 1986. Mahkamah Perusahaan membuat keputusan yang memihak kepada perayu dan telah memberikan award tunggakan gaji (gaji kebelakang) dari 1 Jun 1986 hingga 11 Oktober 1995 (tarikh terakhir perbicaraan) kepada beliau, pampasan bagi menggantikan penempatan semula gaji satu bulan bagi setiap tahun perkhidmatan daripada 1 November 1984 (tarikh mula bekerja) hingga 11 Oktober 1995, dan gaji 20 hari bagi menggantikan cuti yang tidak digunakan. Mahkamah Tinggi telah menolak permohonan responden untuk *certiorari* tetapi Mahkamah Rayuan membenarkan rayuan responden sebahagiannya berhubung dengan gaji kebelakang. Dalam membatalkan award berhubung dengan gaji kebelakang dan mengemukakan semula perkara tersebut kepada Mahkamah Perusahaan untuk taksiran semula, Mahkamah Rayuan memutuskan bahawa dalam menaksirkan award gaji kebelakang Mahkamah Perusahaan seharusnya mengambilkira hakikat bahawa perayu telah mendapatkan pekerjaan di tempat lain selepas pemecatannya. Perayu merayu kepada Mahkamah Persekutuan.

Diputuskan:
Oleh Steve Shim HB (Sabah & Sarawak)

[1] Walaupun taksiran gaji kebelakang adalah merupakan perkara yang di dalam lingkungan budibicara Mahkamah Perusahaan, budibicara itu bukannya suatu budibicara yang tanpa batasan; ianya haruslah dilaksanakan menurut undang-undang dan ekuiti sepertimana yang ditafsirkan oleh s. 30(5) Akta Perhubungan Perindustrian 1967. Budibicara tersebut adalah menurut sifat proses membuat keputusan dan adalah dengan itu terbuka kepada kajian semula kehakiman. Sejajar dengan ekuiti dan perasaan baik Mahkamah Perusahaan seharusnya, dalam menaksirkan kuantum gaji kebelakang, mengambilkira hakikat, jika ditetapkan oleh keterangan atau diakui, bahawa pekerja tersebut telah diambil bekerja dengan bergaji di tempat lain dan *certiorari* akan dikeluarkan untuk memperbetulkannya. Dalam kes semasa, Mahkamah Perusahaan telah gagal memgambilkira fakta material bahawa perayu telah diambil bekerja dengan gaji sejurus selepas pemecatannya. Award berhubung dengan gaji kebelakang adalah dengan itu tidak sempurna.

[Rayuan ditolak; perintah Mahkamah Rayuan yang membatalkan gaji kebelakang dan mengemukakan semula perkara kepada Mahkamah Perusahaan untuk taksiran semula diikrarkan.]

Case(s) referred to:
Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 30(5)

Other source(s) referred to:
Malhotra, *Law of Industrial Disputes*, 4th edn, vol 2, p 961

For the appellant - KP Gengadharan (W Satchithanandhan with him); M/s Genga Maha Wong & Co
For the respondents - N Sivabalah; M/s Shearn Delamore & Co

[Appeal from Court of Appeal; Civil Appeal No: W-04-47-97]

Reported by Gan Peng Chiang

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

This appeal concerns a matter of principle. More specifically, it relates to the proper principle to be applied in assessing quantum of backwages awarded by the Industrial Court, the second respondent.

The appellant, Dr. James Alfred, was appointed as the general manager of the first respondent, Koperasi Serbaguna Sanya Bhd, Sabah on 1 November 1984 with a salary of RM8,000 a month. On 15 May 1986, the first respondent levelled charges of misconduct against the appellant alleging abuse of authority. The appellant replied to the charges. It made no difference because on 1 June 1986, he was dismissed. He then lodged a complaint to the Minister of Human Resources. On 19 January 1988, the Minister referred the case to the Industrial Court. The Industrial Court held that the appellant was dismissed without just cause or excuse. It awarded him backwages and compensation *in lieu* of reinstatement as follows:

(a) arrears of salary (backwages) from 1 June 1986 to 11 October 1995 (the last date the matter was heard in the Industrial Court);

(b) compensation *in lieu* of reinstatement of one month's salary for each year of service from 1 November 1984 to 11 October 1995; and

(c) 20 days wages *in lieu* of unutilised leave.

The first respondent applied for *certiorari* in the High Court. This was rejected. It then appealed to the Court of Appeal. The appeal was dismissed except for the award on backwages. The Court of Appeal was of the view that the Industrial Court, in assessing the award for backwages, should have taken into account the fact that the appellant had found other employment in the period after his dismissal by the respondent. In the circumstances, it ordered the matter to be remitted to the Industrial Court for fresh assessment on the award for backwages. The appellant, dissatisfied with that decision, filed a motion in the Federal Court seeking leave to appeal. Leave was granted on the following question:

> Whether the Industrial Court is bound to deduct or set off from backwages, wages and remuneration earned by the dismissed workman from other employment from the date of dismissal to date of the award.

Now, it is well settled that awards of Industrial Courts are subject to judicial review on account of jurisdictional errors. In the context of this case, we find the following passage from the speech of Lord Reid in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 merits particular citation. It reads:

> It has sometimes been said that it is only where a Tribunal acts without jurisdiction that its decision is a nullity ... But there are many cases where, although the Tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it has no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. … It may have refused to take into account something which it was required to take into account or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.

We take the view that the quantum of backwages is a matter within the discretion of the Industrial Court. That discretion is, however, not unfettered. It has to be exercised according to law. In this connection, s. 30(5) of the Industrial Relations Act 1967, is significant, and it reads:

> The court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form.

It seems clear therefore that the court has to act in accordance with equity in the exercise of its discretion. Here, we may also add that we find sufficient merit in the proposition stated in vol. 2 of the 4th edn of the *Law of Industrial Disputes* by Malhotra cited with approval by the Court of Appeal. The relevant passage on p. 961 bears repetition herein. It reads:

> In dealing with different types of cases, the tribunal in each case has to see that relief should be given in a particular case to a particular workman in the matter of compensation by balancing the conflicting claims and the variations that exist in human conduct and the requirements of social justice. On the parity of reasoning, the adjudicator has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of unemployment with him, with the claim of the workman that he was not employed anywhere at all. The quantum of backwages is, therefore, a matter in the discretion of the tribunal dependent on the facts of a case. The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. ... A workman directed under an award to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere, because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers.

In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it. Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process. As such, it is subject to judicial review.

It is in this light that the factual circumstances of the case have to be examined. Now, the Court of Appeal has stated as follows:

> It is common ground that in August 1988, the respondent found himself other employment in Peninsula Malaysia. Yet, the Industrial Court did not take that into account when awarding the respondent his backwages. It proceeded as though the respondent had not been employed elsewhere during the whole of the period in question. The award in respect of backwages is therefore flawed.

It would appear that the Court of Appeal based its observation on what had arisen in the cross-examination of the appellant who confirmed that since August 1988, he was employed as general manager and later as director of another company. The issue was also raised in the submission of counsel for the first respondent as reflected on p. 408 vol. II of the Appeal Record. It is quite obvious that there was sufficient evidence before the Industrial Court that the workman appellant had been gainfully employed soon after his

dismissal. In our view, this was a material fact which should have been taken into consideration by the Industrial Court in exercising its discretion as to the quantum of backwages to be awarded to the appellant. This was clearly not done in this case. A jurisdictional error of law has arisen. We therefore agree with the stand taken by the Court of Appeal that the award in respect of backwages is flawed and that the matter be remitted to the Industrial Court for reassessment.

Given the conclusion stated, we find it unnecessary to answer the leave question in the way it is postulated. It is sufficient to repeat what we have enunciated earlier that the Industrial Court should in assessing the quantum of backwages, take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal.

For the reasons stated, the appeal is dismissed with costs. The deposit is to account for taxed costs.